

(ii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding.

(iii) The Secretary shall seek comment from the public on the Secretary's pending determination whether implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed Southern DPS.

(iv) The Secretary shall publish notification in the FEDERAL REGISTER of any determination regarding a Tribal Plan and the basis for that determination.

(d) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the ESA relating to endangered species, including regulations in part 222 of this chapter II implementing such exceptions, also apply to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1). Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Scientific Research and Monitoring Exceptions as described in paragraph (b)(1) of this section or Scientific Research and Monitoring Exemptions as described in paragraph (c)(1) of this section, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) and (a)(1)(C) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10(a)(1)(A) permit is received by NMFS, preferably through

the NMFS online application Web site <https://apps.nmfs.noaa.gov>, no later than November 29, 2010. The take prohibitions would take effect if the permit application is rejected as insufficient or a permit is denied. If the permit application is received by November 29, 2010, ongoing research activities may continue without take prohibitions until NMFS issues or denies a permit.

(e) *Affirmative Defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS of North American green sturgeon listed in § 223.102(c)(1), any person claiming that his or her take is authorized via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the take authorization is applicable and was in force, and that the person fully complied with the take authorization requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

[75 FR 30728, June 2, 2010]

§ 223.211 Southern DPS of spotted seal.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species shall apply to the Southern Distinct Population Segment of the spotted seal listed in § 223.102(a)(3).

[75 FR 65248, Oct. 22, 2010]

FIGURES 1–2 TO PART 223 [RESERVED]